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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 CHARLES GRADY,
12 CDCR #T-71212,

13 Plaintiff,

14 vs.

15 RONQUILLO, Correctional Officer,

16 Defendant.

Civil No. 11cv0783 LAB (JMA)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS PURSUANT
TO FED.R.CIV.P. 12(b)**

[ECF No. 9]

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18 **I.**

19 **PROCEDURAL BACKGROUND**

20 Charles Grady ("Plaintiff"), a prisoner currently incarcerated at Pleasant Valley State
21 Prison in Coalinga, California, proceeding pro se and *in forma pauperis*, filed this civil rights
22 action pursuant to 42 U.S.C. § 1983 on April 13, 2011. Plaintiff alleges that while he was
23 housed at the Richard J. Donovan Correctional Facility ("Donovan") in 2010 and 2011 his
24 constitutional rights were violated.

25 Defendant Ronquillo has filed a Motion to Dismiss pursuant to FED.R.CIV.P. 12(b) and
26 12(b)(6). However, Plaintiff has failed to file an Opposition. The Court has determined that
27 Defendant's Motion is suitable for disposition upon the papers without oral argument and that
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1 no Report and Recommendation from Magistrate Judge Jan M. Adler is necessary. *See* S.D.
2 CAL. CIVLR 7.1(d)(1), 72.3(e).

3 **II.**

4 **FACTUAL ALLEGATIONS**

5 In October and November of 2010, Plaintiff, while housed at Donovan, alleges that
6 Defendant Ronquillo would destroy inmate administrative grievances. (*See* Compl. at 3.) As a
7 result, Plaintiff was unable to properly resolve his grievances. (*Id.*) Plaintiff wrote an
8 administrative grievance alleging that Defendant Ronquillo was “disrespectful” and Plaintiff
9 claims that Ronquillo began to retaliate against him for filing a grievance against her. (*Id.*)
10 Plaintiff further alleges that Ronquillo attempted to have Plaintiff “beat up” another inmate on
11 her behalf. (*Id.*) When Plaintiff refused to start a fight, he alleges Ronquillo informed him that
12 even though he did not currently have any enemies, she would “see that I would have some.”
13 (*Id.*) Plaintiff claims he also stopped receiving his halal religious meals as an act of retaliation
14 by Ronquillo. (*Id.*) Plaintiff further alleges Ronquillo purposefully staged events so that fights
15 would start among inmates. (*Id.*)

16 On one occasion, Plaintiff claims that the cell door of another inmate and Plaintiff’s cell
17 were purposefully left open so that they would engage in combat. (*Id.* at 4.) Inmate Newell is
18 alleged to have “charged” at Plaintiff. (*Id.*) While this was happening, another correctional
19 officer “yelled lock-down” but Ronquillo intervened and stated “let it happen, this is going to
20 be a good one.” (*Id.*) As another inmate was hitting Plaintiff, Plaintiff claims he was shot “with
21 a block gun” four times. (*Id.* at 4-5.) Plaintiff claims that Ronquillo was known to set up fights
22 among inmates. (*Id.* at 5.)

23 **III.**

24 **DEFENDANTS’ MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)**

25 As a preliminary matter, the Court will first consider Defendant’s arguments that
26 Plaintiff’s Complaint should be dismissed for failing to exhaust available administrative
27 remedies pursuant to FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a).

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A. Standard of Review per FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a)

Defendant Ronquillo claims Plaintiff failed to exhaust available administrative remedies pursuant to 42 U.S.C. § 1997e(a) before bringing this suit, therefore, Ronquillo seeks dismissal under the “non-enumerated” provisions of FED.R.CIV.P. 12(b). The Ninth Circuit has held that “failure to exhaust nonjudicial remedies is a matter of abatement” not going to the merits of the case and is properly raised pursuant to a motion to dismiss, including a non-enumerated motion under FED.R.CIV.P. 12(b). *See Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) It is also well established that non-exhaustion of administrative remedies as set forth in 42 U.S.C. § 1997e(a) is an affirmative defense which defendant prison officials have the burden of raising and proving. *See Jones v. Bock*, 594 U.S. 199, 216 (2007); *Wyatt*, 315 F.3d at 1119. However, unlike under Rule 12(b)(6), “[i]n deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact.” *Wyatt*, F.3d at 1120.

B. Exhaustion of Administrative Remedies per 42 U.S.C. § 1997e(a)

The Prison Litigation Reform Act (“PLRA”) amended 42 U.S.C. § 1997e(a) to provide that “[n]o action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). “Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002). 42 U.S.C. § 1997e(a) has been construed broadly to “afford [] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case, *id.* at 525-26, and to encompass inmate suits about both general circumstances and particular episodes of prison life--including incidents of alleged excessive force. *Id.* at 532. Finally, “[t]he ‘available’ ‘remed[y]’ must be ‘exhausted’ before a complaint under § 1983 may be entertained,” “regardless of the relief offered through administrative procedures.” *Booth v. Churner*, 532 U.S. 731, 738, 741 (2001); *see also McKinney v. Carey*, 311 F.3d 1198, 1200-01 (9th Cir. 2002).

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1 The State of California provides its prisoners and parolees the right to administratively
 2 appeal “any departmental policies, decisions, actions, conditions, or omissions that have a
 3 material adverse effect on the welfare of inmates and parolees.” CAL. CODE REGS., tit. 15
 4 § 3084.1(a) (2011). Prior to January 28, 2011, in order to exhaust available administrative
 5 remedies within this system, a prisoner would proceed through several levels: (1) informal
 6 resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal
 7 to the institution head or designee, and (4) third level appeal to the Director of the California
 8 Department of Corrections. CAL. CODE REGS., tit. 15 § 3084.1(a) (2010). However, in January
 9 2011, the process was changed. Following January 28, 2011, prison regulations no longer
 10 required an inmate to submit to informal resolution while the other remaining levels remain the
 11 same. CAL. CODE REGS. tit. 15 § 3084.5 (2011).

12 **C. Application of 42 U.S.C. § 1997e(a) to Plaintiff’s Case**

13 Defendant Ronquillo argues that Plaintiff failed to exhaust his administrative remedies
 14 *prior* to filing this lawsuit. In support of her claim, Defendant provides the declaration of R.
 15 Cobb, Appeals Coordinator at Donovan. (*See* Defs. Mot, Cobb Decl. at ¶ 2.) Plaintiff was
 16 housed at Donovan from March 22, 2010 to April 13, 2011. (*Id.* at ¶ 8.) In Cobb’s Declaration,
 17 he states that he reviewed all the administrative appeals submitted by Plaintiff while housed at
 18 Donovan. (*Id.* at ¶ 8.)

19 Plaintiff filed an administrative grievance on March 12, 2011 in which Plaintiff raised
 20 several grievances against Defendant Ronquillo that were related to the issues in Plaintiff’s
 21 Complaint. (*Id.* at ¶ 9(b)). This grievance was classified as a staff complaint. (*Id.*) However,
 22 Cobb rejected this grievance on March 16, 2011 for failing to comply with the regulations. (*Id.*
 23 citing CODE REGS., tit. 15 § 3084.2(a)(2) and 3084.6(b)(5) (2011)). Specifically, Plaintiff’s
 24 grievance exceeded the page limitation. (*Id.*) Plaintiff was sent a rejection letter by Cobb
 25 notifying Plaintiff that he had failed to comply with § 3084.6(b)(5). (*Id.*, Ex. C. Screening at
 26 First Level dated March 16, 2011). Plaintiff did “not attempt to re-submit the appeal.” (*Id.*)

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1 The Supreme Court has made clear that Plaintiff must “properly exhaust” his
 2 administrative remedies before filing a prison conditions action. In *Woodford v. Ngo*, 548 U.S.
 3 81, 91 (2006), the Supreme Court held that “[p]roper exhaustion demands compliance with an
 4 agency’s deadlines and other critical procedural rules because no adjudicative system can
 5 function effectively without imposing some orderly structure on the course of its proceedings.”
 6 *Woodford*, 548 U.S. at 91. The Court further held that “[proper exhaustion] means ... a prisoner
 7 must complete the administrative review process in accordance with the applicable procedural
 8 rules ... as a precondition to bring suit in federal court.” *Id.*

9 Plaintiff has failed to rebut Defendant Ronquillo’s showing that he failed to properly
 10 exhaust his administrative grievances prior to bringing this action. Thus, the Court **GRANTS**
 11 Defendant’s Motion to Dismiss Plaintiff’s Complaint for failing to exhaust his administrative
 12 remedies as required by 42 U.S.C. § 1997e(a). This dismissal is without prejudice to permit
 13 Plaintiff to file a separate action once he has properly exhausted his administrative remedies.
 14 The Court will not address the remainder of Defendant’s Motion as dismissal of the entire action
 15 without prejudice is warranted at this time.

16 IV.

17 CONCLUSION AND ORDER

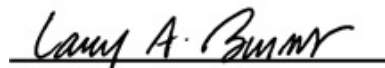
18 Based on the foregoing, the Court hereby:

19 **GRANTS** Defendant’s Motion to Dismiss Plaintiff’s Complaint for failure to exhaust his
 20 administrative remedies pursuant to FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a). This
 21 dismissal is without prejudice.

22 The Clerk of Court shall close the file.

23 **IT IS SO ORDERED.**

24 DATED: November 10, 2011

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26 HON. LARRY ALAN BURNS
 27 United States District Judge
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